Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOSEPH M. GERSTEN, Petitioner,

v.

KATHERINE FERNANDEZ RUNDLE, in her capacity as State Attorney for the Eleventh Judicial Circuit, Dade County, State of Florida, Respondent.

CORRECTED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 1995

QUESTIONS PRESENTED FOR REVIEW

May a §1983 action alleging that a state prosecutor is pursuing, in bad faith and harassment, civil contempt proceedings and incarceration against a plaintiff as part of a course of action intended to deprive him of rights under the First and Fourteenth Amendments be maintained, or must the plaintiff endure the bad faith prosecution and present his claims only in the state courts?

Whether a First Amendment right to seek and hold office exists, and, if so, whether such right forms the basis of a §1983 action alleging bad faith prosecution of civil investigative proceedings by a state prosecutor?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH M. GERSTEN, Petitioner

v.

KATHERINE FERNANDEZ RUNDLE, in her capacity as State Attorney for the Eleventh Judicial Circuit, Dade County, State of Florida, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Joseph M. Gersten respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals affirmed the district court without opinion (App. A, infra), as reported at 56 F.3d 1389. The opinion of the district court (App. B, infra) is reported at 833 F.Supp. 906.

JURISDICTION

The court of appeals entered its judgment on May 15, 1995. Petitioner filed a timely motion for rehearing on May 5, 1995. The court of appeals denied the motion for rehearing on July 27, 1995. (App. C, infra). The jurisdiction of this Court is invoked

under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 provides, in relevant part, that persons in the position of Petitioner possess the right of redress for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

STATEMENT

Petitioner, an elected official of the State of Florida, was the subject of civil proceedings by Respondent, a county prosecutor of the State of Florida. Respondent was a political supporter of Petitioner's opponent in a pending election for Petitioner's county commissioner office. Respondent, ostensibly as part of an investigation of a crime, in which Petitioner was the victim, but in fact as part of an investigation of Petitioner, subpoenaed Petitioner to appear before her office on the day of the election. Petitioner appeared and answered questions regarding the crime of which he was a victim. He refused to answer questions irrelevant to the crime, on the grounds that the investigation was conducted in bad faith and with a desire to harass and frustrate him in his efforts to seek reelection to his state office, and on the grounds that the real target of the investigation was himself. After Petitioner was held in contempt, App. D, infra, and incarcerated for his refusal to cooperate, and while he was under threat of a renewed contempt proceeding, he filed this action in the district court seeking injunctive relief against Respondent, enjoining her from further proceeding against him in civil contempt.

Petitioner offered to prove that the decision to subpoena him on election day, and to seek contempt and incarceration of him would not have been made absent improper motives on the part of the prosecutor -- a motivation to harass and prosecute him in bad faith and to harass and to interfere with his exercise of his First Amendment right to seek office. Petitioner argued that in such a situation his forced participation in state contempt proceedings would constitute a violation of his federal constitutional rights which could not be vindicated by state process.

The district court dismissed the action, principally on the grounds Petitioner did not allege bad faith on the part of the state courts.

A. The Factual Background

The facts recited here are alleged in Petitioner's Complaint, App. E, infra, in the district court and in Petitioner's Emergency Motion for Temporary Restraining Order and Preliminary Injunction, which was before the district court when the judge rendered the decision.

Petitioner was a Dade County, Florida Commissioner. He reported his vehicle stolen from his home on April 29, 1992 to the police who prepared a police report. Petitioner's car was returned to him several days later. No questions were asked of him by the police or the state prosecutors at that time.

Petitioner was notified by press reports of the accusations of the persons found in possession of his stolen car. The accusers, a convicted felon and prostitute, and a convicted felon and drug addict, made allegations that Petitioner solicited the

prostitute for prostitution, engaged in sexual acts with her, used cocaine at a crack house and purchased cocaine from another individual while at the crack house. Initially these reports were not taken seriously by Petitioner. As time passed, however, Petitioner was told by his campaign and commission press aides that the state prosecutor had publicly announced that the State Attorney was investigating the allegations made against Petitioner by the thieves. A media frenzy ensued, which to this date has not subsided. Petitioner consulted with his legal counsel, William Richey, about the press reports and the state prosecutor's announced investigation. Mr. Richey confirmed the existence of an investigation.

The investigation announced by the state prosecutor proceeded. However, instead of focusing on the prosecution of the confessed thieves, it was diverted toward Petitioner. The state prosecutor alleged, in a most unusual pre-charge subpoena for Petitioner's hair, that Petitioner's hair contained the res of a crime committed by Petitioner. The subpoena was obtained from a state judge, and Petitioner was made to submit to the taking of body and head hairs for submission for testing by the Federal Bureau of Investigations (FBI) for the presence of illegal drugs.

Petitioner was taken to the Dade County Medical Examiner's Office, where his pubic, underarm, and head hairs were removed by the root and sent to the FBI laboratory in Washington, D.C. The result of the FBI drug test was negative.

Since there was no evidence of drug use based on the above described test of Petitioner's hair, there was no probable

cause to believe he committed any of the drug-related activities alleged by his accusers. Nonetheless, a high-ranking investigator with Respondent's office, with the approval of the Respondent's immediate predecessor, told Petitioner's counsel that Petitioner was required to answer their questions and that if Petitioner's responses varied from the accusing thieves, Petitioner would be charged with perjury.

While the state continued its investigation against Petitioner, the two felons found in possession of Petitioner's car were arrested on outstanding, and unrelated, warrants for kidnapping and armed robbery. The state placed a weekly dollar amount in the prostitute's jail commissary account. The male drug addict was not incarcerated on the outstanding warrant. Instead, he was housed in a hotel and paid a daily stipend by the State. After some disagreement with the State, apparently about money, the male drug addict telephoned Mr. Richey and offered to sell him testimony supporting Petitioner's position for the sum of $10,000. Mr. Richey's investigators then notified the State investigators, who prepared electronic interception and recording of the offer while it was being made face-to-face by the addict to Mr. Richey's investigator. The male addict was then arrested, but not for soliciting a bribe or other related crime. Rather, he was arrested for the still outstanding, and unrelated, kidnapping and armed robbery warrant.

The state prosecutor then announced that she was opening separate investigation of the auto theft against these two individuals, notwithstanding that both had already confessed to the crime, and were subsequently immunized. The state prosecutor maintains

that there was and is no communication between the two prosecutors, their staffs, and their superiors. The state has argued that it has erected an impermeable "Chinese wall" between the two state prosecutors. Petitioner submits that this is a sham and a ruse.

Throughout all phases of the state prosecutors' investigations of this case, the media was made aware of all the latest developments, usually before Petitioner or his counsel were advised. Information in the press reports was almost always exclusively in the possession of the State. At each new turn and development, Petitioner was embarrassed and humiliated in the media.

On the day before the primary election in which Petitioner sought to retain his position as Dade County Commissioner, the press reported that Petitioner was being subpoenaed to appear in the office of the state prosecutor to give testimony regarding the theft of his car, or otherwise be jailed. Petitioner was subpoenaed to appear before the assistant state prosecutor on election day. Petitioner, on advice of counsel, respectfully declined to respond to questions unrelated to the car theft. Petitioner did, however, state that he was the owner of the car in question, that he reported it stolen, and that the persons in the car when it was recovered did not have permission to possess it.

At the hearing as to why Petitioner should not be held in contempt, Petitioner presented evidence that the state prosecutor was selectively using its subpoena power in a manner which violated the Equal Protection Clause of the United States Constitution. The next day, in the presence of extensive media coverage, Petitioner was remanded to

the custody of the Dade County Department of Corrections.

Upon his arrival at the correctional facility, Petitioner was given a routine physical examination whereupon the examining nurse found Petitioner's blood pressure to be dangerously high. Prior to his incarceration, Petitioner had never suffered from high blood pressure. Petitioner was immediately transported to the hospital and admitted for treatment. Petitioner was concerned about the immediate and long-term effects of potent medicines that he had never taken prior to his having this episodic high blood pressure caused by his incarceration. Petitioner sought an independent medical examination and opinion. This was refused.

Petitioner was then discharged from the hospital and transported to a maximum security unit of a correctional facility. In this unit were housed five death row inmates sentenced to die in the electric chair, numerous murderers, extremely violent criminals and inmates from other units in the facility who posed a serious threat to others. While alone in his cell, Petitioner was assaulted by a particularly violent criminal sentenced for multiple violent home invasions. This criminal attempted to beat Petitioner about the head with a telephone and his hands. Petitioner escaped with the help of a prisoner/trustee.

Petitioner was examined by a correction's physician who found his blood pressure to be 170/110, and in consultation with physicians at the hospital, Petitioner was sent to another hospital for examination and treatment by independent physicians. These physicians later testified that if Petitioner were made to remain in jail for an extended period of time, his health would be

seriously affected to the point where his life could be in danger.

At the state court contempt hearing, the judge allowed Petitioner to explore the constitutional issues, but discounted the testimony and evidence presented of "bad faith" and accepted on its face Respondent's argument. The constitutional issues were raised at the Florida Court of Appeals, which affirmed per curiam without opinion. (App. F, infra). Under Florida's constitutional scheme, there is no appeal from a per curiam affirmance without opinion. The Florida Star v. B.J.F., 530 So.2d 286, 288, n. 3 (Fla. 1988), reviewed, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989).

B. The Proceedings Below

The instant action was commenced in the U.S. District Court for the Southern District of Florida on June 25, 1993. On July 22, 1993, Respondent filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

In its Order Granting Defendant's Motion to Dismiss, the district court characterized Petitioner's action as one for an injunction against a state civil contempt proceeding. App. B-1. The court acknowledged Petitioner's action as one alleging that Respondent was acting in bad faith, resulting in a denial of constitutional rights. App. B-2.

The district court acknowledged that this case requires consideration of the exceptions to Younger v. Harris, 401 U.S. 37 (1971), and Juidice v. Vail, 430 U.S. 327 (1977), and the district court also acknowledged that those cases hold that "bad-faith enforcement or other circumstances" justifies exception to the Anti-Injunction

Act and, in the Eleventh Circuit, obviates the need for a plaintiff to show irreparable harm in seeking an injunction. App. B-7-8. However, the district court failed to apply these exceptions in its analysis of Petitioner's case.

The court first addressed Petitioner's claims of bad faith prosecution and held that Petitioner's perjury trap claim was premature because the state is entitled to attempt to spring a perjury trap before one can complain about it. The court determined that "bad faith by the State in the investigatory process can only be challenged in federal court when that bad faith manifests itself in an imminent [criminal] prosecution." App. B-11.

The court then reviewed the law of Younger and Juidice and characterized the bad faith or harassment exception as applying only to "bad faith on the part of the state courts; that is, for a United States court to intervene, a plaintiff must show that the opportunity to pursue his federal claims in the state court system was not fair." App. B-14.

The district court next addressed Petitioner's claim of unconstitutional selective enforcement. Noting that selective enforcement claims are recognized in the non-criminal arena, the court adopted a Second Circuit test for allegations of selective enforcement, that "a plaintiff must show '(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution [or enforcement], and (2) that the government's prosecution [or enforcement] has been invidious or in bad faith . . . .'" App. B-16-17 (brackets in

original); citing University Club v. City of New York, 655 F.Supp. 1323 (S.D.N.Y. 1987), aff'd, 842 F.2d 37 (2d Cir. 1988).

The court acknowledged Petitioner's reliance on testimony of a Deputy Chief in Respondent's office that no other person in Dade County had ever been subjected to a contempt prosecution in the investigatory stage of a car theft case. App. B-19.

Without discussing Petitioner's claim that the government's prosecution was invidious and in bad faith, the court concluded that Petitioner failed to adequately allege that the other Dade County auto theft cases presented "substantively similar situations." Id.

The district court turned next to Petitioner's claim that Respondent "in bad faith used her political power to thwart him in his election campaign." The court discussed Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981). Kaylor was summarized as holding "that [where] the state attorney 'threatened to prosecute them in an attempt to punish them for their political beliefs and for exercising their right to free speech,'" a §1983 claim was stated, and that the Kaylor plaintiffs were allowed to re-file their complaint to allege facts with reasonable specificity to support their claim. App. B-20.

Rather than following Kaylor, the district court stated that in Petitioner's case there existed and exists no "threat of [criminal] prosecution," and, that such a conclusion raises the question of whether "Plaintiff's electoral loss (allegedly the result of the statements and actions of Respondent state attorney), represents the denial of a constitutional right." App. B-21.

Thus framing its inquiry, the district court quoted an Eleventh Circuit case: "Although he certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election." Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985), cert. denied, 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986). On this authority the court held that Petitioner does not have a cause of action "related to his electoral loss." App. B-22.

The district court dismissed Petitioner's action, with prejudice.

After full briefing, the court of appeals affirmed, without opinion.

REASONS FOR GRANTING THE PETITION

A. The proper remedy for a bad faith civil contempt prosecution.

The chief issue presented is whether the defendant in a bad faith state civil investigation proceeding, involving incarceration for civil contempt, must suffer the contempt and the incarceration and seek relief only in the state courts, or whether as Justice Stewart put it:

> "in such circumstances [bad faith] the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights."

Younger v. Harris, 401 U.S. 37, 56 (Stewart,

J., concurring).

The essential error of the district court was its failure to address Part II of Juidice v. Vail, which applies the Younger v. Harris exception to civil contempt proceedings. Neither Younger nor anything in Part II of Juidice v. Vail requires the victim of a bad faith prosecution involving incarceration, whether criminal or civil, to go to jail first, before raising bad faith on the part of the state prosecutor. Contra, Ballard v. Stanton, 833 F.2d 593 (6th Cir. 1987).

Here, Petitioner adequately alleged that the state, through its prosecutor, has used and threatens to use again a valid civil procedure as an instrumentality for the bad faith purpose of suppression of free expression and to interfere with and destroy Petitioner's right to seek and hold office.

The critical difference between the results in Younger, Juidice, and this case is that in those cases the "only constitutional issue at stake is the validity of the challenged state law - that being prosecuted under an arguably (or actually) invalid law is not itself a violation." Developments in the Law-Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1286 (1987)(emphasis in original).

In this case the bad faith prosecution by the prosecutor is itself the constitutional violation. Phelps v. Hamilton, 840 F.Supp. 1442, 1458 (D. Kan.)(Crow, J.), reversed on other grounds and remanded, 59 F.3d 1058 (10th Cir. 1995). Unlike Juidice v. Vail and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), in this case Petitioner makes no claim that Respondent is proceeding

under a constitutionally defective procedure. The sole claim is that she is using facially valid state procedures in bad faith, and selectively, with an invidious motivation to harass and interfere with Petitioner's constitutional rights.

In such a situation, the comity principle behind this Court's Younger jurisprudence does not exist. Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979), appeals after remand, 638 F.2d 799, 638 F.2d 801 (5th Cir. 1981). The federal courts owe respect only to the states' legitimate pursuit of their substantive interests. There is no vital state interest in a bad faith prosecution, nor in one undertaken for the purpose of interfering with and harassing the defendant in the exercise of constitutional rights. A bad faith prosecution for political motives which actually has interfered, and will interfere with the future, with constitutional rights is, by definition, an illegitimate exercise of state power no matter what facially constitutional procedure is employed. Lewellen v. Raff, 843 F.2d 1103, 1109-1110 (8th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); Fitzgerald v. Peek, 636 F.2d 943 (5th Cir. 1981), cert. denied, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975); Cooper v. Casey, 837 F.Supp. 938 (N.D.Ill. 1993); Westin v. McDaniel, 760 F.Supp. 1563 (M.D. Ga. 1991), aff'd, 949 F.2d 1163 (11th Cir. 1991). "In simplest terms, a bad faith prosecution causes an immediate and irreparable constitutional injury." Phelps v. Hamilton, supra, 840 F.Supp. at 1458-1459.

The district court failed to recognize and apply the bad faith or harassment exception of Younger. Compare, Wilson v. Thompson, 593 F.2d 1375 (5th Cir. 1979),

appeals after remand, 638 F.2d 799, 638 F.2d 801 (5th Cir. 1981); Phelps v. Hamilton, 840 F.Supp. 1442 (D. Kan. 1993), rev'd, 59 F.3d 1058 (10th Cir. 1995); Pizzolato v. Perez, 524 F.Supp. 914 (E.D. La. 1981). The district court erred by dismissing Petitioner's action in favor of state court consideration of his federal §1983 bad faith claims against a state prosecutor.

In Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) this Court held state court interpretation of federal claims "irrelevant" where a §1983 plaintiff alleges a bad faith criminal prosecution with a true purpose of interfering with constitutionally protected activities. Relegation of the claims to state court "would not alter the impropriety of [state officials'] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities, as [the state officials] are doing and plan to continue to do." Dombrowski v. Pfister, 380 U.S. at 490 (1965).

Younger analyzed and clarified the Dombrowski holding on the immediate availability of federal relief where a criminal prosecution is brought in bad faith. Younger v. Harris, 401 U.S. at 47-50. In Younger, however, no bad faith was alleged against the state prosecutor.

Juidice announced that the bad faith exception applied to civil contempt involving incarceration. Juidice v. Vail, 430 U.S. at 338. In Juidice, no state prosecutor was involved.

In this case, bad faith on the part of a state prosecutor is alleged, and it was accepted as existing by the district court. App. B-2, 22-23. The district court

recognized the Younger bad faith exception. App. B-7. The opinion analyzes this case in light of Part I of Juidice, App. B-13, and applies the result in Juidice, relegating the claims to the state court system. App. B-14.

The district court reached page 337 of Juidice, but ignored page 338.

It is possible the district court silently construed page 338 of Juidice to limit the §1983 bad faith action permitted in Part II to actions against state judges. If so, that was error. Contra, Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of the Borough of Essex Falls, 876 F.Supp. 641, 659 (D.N.J. 1995); Espil v. Sells, 847 F.Supp. 752, 757 (D.Az. 1994).

The sentence in Juidice, "This exception may not be utilized unless it is alleged and proved that they are enforcing the contempt procedures in bad faith or are motivated by a desire to harass," does refer only to Respondent state judges and not to the creditors. Juidice v. Vail, 430 U.S. at 338. But the creditors who were prosecuting the contempt proceedings in Juidice were not parties to that case. Only state judges were Respondents. Id., 430 U.S. at 327, 329.

Nor were the creditors in Juidice state officials. Accordingly, they were not subject to §1983, at least without a showing the Petitioners in Juidice never attempted to make. Juidice does not, therefore, present any issue about the application of the bad faith exception to a state prosecutor.

Here Respondent is a state prosecutor proceeding in bad faith. On the reasoning of Justice Stewart and the formulation in Younger the State Attorney is equally as

amenable to an injunction against bad faith prosecution as a state judge. The constitutional harm to Petitioner is being subjected to that bad faith prosecution, and being incarcerated as part of a bad faith prosecution. Raising the bad faith, the harassment, and the federal constitutional violations only in state court is not the remedy dictated by Dombrowski, Younger and Juidice.

The decision of the district court, affirmed by the court of appeals, decides a federal question in a way which conflicts with applicable decisions of this Court. The decision reflects substantial confusion with the law of Dombrowski, Younger and Juidice. Other federal courts have reached conflicting and confusing conclusions when trying to apply this Court's jurisprudence in the area. Wilson v. Thompson, 593 F.2d 1375, 1383 (5th Cir. 1979); Ballard v. Stanton, 833 F.2d 593 (6th Cir. 1987); Phelps v. Hamilton, 840 F.Supp. 1442 (D. Kan. 1993) (Crow, J.), reversed and remanded, 59 F.3d 1058 (10th Cir. 1995); Pizzolato v. Perez, 524 F.Supp. 914 (E.D. La. 1981); Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of the Borough of Essex Falls, 876 F.Supp. 641, 659 (D.N.J. 1995).

Thus, the Younger question presented by this case is whether the gravamen of the holding in Dombrowski v. Pfister, the "impropriety of (state officials) invoking the statute in bad faith to impose continuing harassment in order to discourage appellant's constitutional activities . . . ," does require "speedy and effective" federal action to protect constitutionally protected conduct. Younger v. Harris, 401 U.S. 37, 56 (Stewart, J. concurring).

B. The §1983 violations.

1. The right to seek and hold elective office. The district court simply failed to understand that Petitioner was alleging interference with his constitutionally protected right to run for public office unfettered by bad faith and harassing tactics emanating from Respondent. Petitioner alleged Respondent subpoenaed him to appear for questioning in a criminal investigation on the date of the primary election where he faced an opponent publicly supported by Respondent. The subpoena and the investigation were widely covered in the local media, as Respondent intended. Petitioner was physically removed from the electorate on the day of the election, when he intended to campaign for office. He lost the election by 83 votes. If 42 voters were swayed by the publicity to change their votes, or if Petitioner's campaigning on election day would have garnered him 84 more votes, Respondent's actions, alleged to be in bad faith, interfered with Petitioner's quest for reelection.

Such action with such motivation by a state official with the power to subpoena and incarcerate has a chilling, nay, an actual prohibitory interference with Petitioner's constitutional rights. Forcing a candidate for elective office into the prosecutor's office for questioning on election day itself, attended by public statements in the media, and incarcerating him because he objects, are actions obviously antipathetic to any characterization of a right to seek and hold office.

This Court has never squarely held that the First Amendment protects a citizen's right to run for office. Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). This Court has decided First Amendment cases that suggest such a right exists. Lubin v. Panish, 415

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U.S. 709, 716, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). There is no doubt the kinds of activities associated with running for public office, such as speaking in public and distributing writings in the nature of campaign literature, are protected forms of expression. See, e.g., Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). This case presents the opportunity for the Court to hold the right to seek and hold office is protected by the First Amendment, and by the equal protection clause of the Fourteenth Amendment, against interference by state officers.

And, because this is a §1983 case involving state officials and a state election, this case presents another question undecided by this court: whether interference by a state official with a citizen's right to seek office is a constitutional violation cognizable in a §1983 action.

The district court actually describes Petitioner's claims in these terms. App. B-5, 19, 23. But when determining the issue, the court characterized Petitioner's claim instead as resting on a claim of right to win the election. App. B-22.

Petitioner does not disagree with the district court's characterization of the law that he has no constitutional right to win an election. But the district court gives no credence to Petitioner's allegations that his constitutional right to run in an election is invaded when a state prosecutor aligned with his political opponent acts with bad faith motivation. See, e.g., Pizzolato v. Perez, 524 F.Supp. 914, 926 (E.D. La. 1981) (permanent injunction against pending state court proceeding for election fraud where prosecution in bad faith and harassment based

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on political opposition).

The physical removal of Petitioner by a bad faith subpoena on election day unquestionably interferes with his ability to run for public office because he is removed from the public, unable to speak or to disseminate his message to the electorate in writing.

So does the publicity attending a bad faith subpoena of a candidate for public office.

2. The right to be free from a bad faith investigation.

The district court's perjury trap reasoning ignores the very allegation Petitioner alleges: the prosecutor is pursuing the investigation in bad faith. A bad faith prosecution in its investigatory stage, i.e., its civil stage, is just as objectionable as a bad faith prosecution. Juidice v. Vail. Where the state acts in bad faith, there is no distinction between criminal and civil proceedings. Accordingly, the district court's resolution based on its finding that no criminal prosecution was imminent was constitutionally irrelevant. There was more than an imminent threat of civil proceedings. Where the state acts in bad faith the federal courts must intervene, regardless of the criminal or civil nature of a contempt proceeding. Juidice v. Vail.

The district court failed to perceive that the bad faith exception overrides the imminent prosecution exception. App. B-12. Nothing in the record shows any good faith attempt to prove car theft, a crime which had been confessed to already, in any event. Moreover, Petitioner answered the state's questions related to car theft. But,

according to the district court, the state is perfectly free to proceed in bad faith to ask Petitioner irrelevant questions with a purpose of proving perjury. This reasoning departs from the Younger bad faith exception. It does violence to the constitution and the federal court's place in protecting citizens from constitutional violations of the worst type -- those executed with secret political malice by the state.

3. The right to be free from selective enforcement.

The same problem infects the district court's decision on the selective enforcement issue. The court acknowledges the two-pronged test for selective enforcement developed by the courts of appeals: (1) that the plaintiff must allege he has been singled out for civil enforcement in a situation where others similarly situated have not; and (2), that the government's prosecution has been invidious or in bad faith. United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974). In this case, Petitioner has alleged both prongs.

Next, the district court imposed a new requirement to plead not just that no other victim of an auto theft has ever been the subject of a rule to show cause, which Petitioner did do, but to go further and plead specifically that all other auto theft cases presented substantively similar situations. Petitioner can so allege but the district court dismissed his complaint without considering the liberal right to amend under the Federal Rules of Civil Procedure. Instead, the district court saddled Petitioner with an impossible burden of proof: that he must show "all" other auto theft cases were dissimilar. This places an impossible, and therefore constitutionally

intolerable, burden on a §1983 plaintiff.

The error, however, began before the district court denied leave to amend. Where a prosecutor is proceeding in bad faith and with a purpose to interfere with protected rights, that allegation alone establishes an adequate pleading of selective enforcement. See Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

CONCLUSION

In this case, the record shows that Petitioner was offering to prove Respondent state prosecutor was a political supporter of his opponent in a state election, that she caused him to be subpoenaed to appear before her office on the day of the election to answer questions under oath in a nine-month-old auto theft case which had a three-year statute of limitations. She intentionally exploited media attention in the electronic and print media that the suspects in the auto theft cases were felon drug addicts who claimed Petitioner was at a crack house. By her subpoena, Respondent physically removed Petitioner from the electorate on election day, when he would otherwise have been campaigning to hold his incumbent office. He lost the election by 83 votes to Respondent's candidate.

Prior to the appearance of Petitioner before Respondent's office to respond to her subpoena, two of her officers stated on the record that they would pursue a perjury prosecution against Petitioner if his version of events on the day of the auto theft departed from that of the felon drug addicts and others at the crack house. Also before the return date of the subpoena, the felons had confessed to the auto theft, and had been immunized. Nevertheless, Respondent took the

position that the purpose of the investigation was to gather evidence against the confessed thieves, not against Petitioner. When Petitioner appeared before Respondent's office on election day, he answered under oath questions about the auto theft. He refused to respond to questions which were unrelated to the auto theft.

Respondent instituted a civil contempt proceeding against Petitioner. Petitioner argued Respondent was proceeding in bad faith, and with a purpose to harass and intimidate Petitioner, motivated by a desire to interfere with and destroy Petitioner's constitutional right to seek and hold public office.

The state court judge who heard the contempt refused to consider Petitioner's constitutional arguments, terming the matter a "simple contempt." The Florida Court of Appeals affirmed without opinion in a manner that foreclosed review by the Florida Supreme Court as a matter of state law. Under Florida procedure, the only record which existed of Petitioner's constitutional arguments in the state proceeding was the transcript of oral argument before the trial court.

The state trial court ordered Petitioner incarcerated for civil contempt. He served approximately three weeks before being released. He was housed with hardened, violent criminals, and was assaulted. His health deteriorated and he was hospitalized. He obtained his release pending Florida Court of Appeal consideration of his case.

Now, Respondent has reinstituted the entire procedure. If Petitioner stands on his federal rights he faces another finding of contempt, followed by another

incarceration and another state civil contempt proceeding with no meaningful opportunity to raise his federal claims. The present order of incarceration stands, even though the statute of limitations within which to prosecute the car thieves has expired.

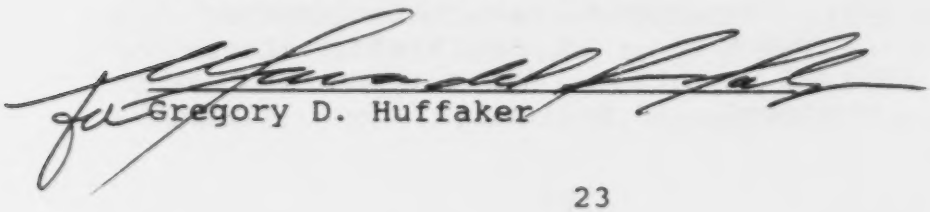
The district court held that Petitioner's only remedy on these well pleaded facts was to raise his bad faith and harassment claims again in the state courts, and seek certiorari in this Court. App. B-14. The district court's decision departed from this Court's jurisprudence in Dombrowski, Younger and Juidice. Given the history of the state court's consideration of the constitutional issues the first time around, and the practical impossibility this Court would grant certiorari to call up the record of proceedings in a state trial Court, the district Court's decision was error.

These issues are important; they recur with frequency. The diversity of results on similar facts in the federal courts is a constitutional and institutional problem which should be addressed. The decision below conflicts with this Court's jurisprudence. This case is appropriate to resolve the questions presented.

Petitioner respectfully requests this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Dated this 25th day of October, 1995.

Respectfully submitted,



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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOSEPH M. GERSTEN, Petitioner,

v.

KATHERINE FERNANDEZ RUNDLE, in her capacity as State Attorney for the Eleventh Judicial Circuit, Dade County, State of Florida, Respondent.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5032

[STAMP] [FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 15, 1995
MIGUEL J. CORTEZ
CLERK]

D.C. Docket No. 93-1229-CIV-JMK

JOSEPH M. GERSTEN,

Plaintiff-Appellant,

versus

KATHERINE FERNANDEZ RUNDLE, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

(May 15, 1995)

Before TJOFLAT, Chief Judge, ANDERSON Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: May 15, 1995
For the Court : Miguel J. Cortez, Clerk

By: s/_____
Deputy Clerk

ISSUED AS MANDATE: [Handwritten] 8/10/95

[**APPENDIX "A"**]

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[1]11th Cir. R. 36-1 provides:
When the court determines that any of the following circumstances exist:
(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgement has been entered without a reversible error of law;
and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-1229-CIV-KING

JOSEPH M. GERSTEN,

Plaintiff,

vs.

KATHERINE FERNANDEZ RUNDLE, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court on Defendant's Motion to Dismiss, filed on July 22, 1993. A hearing was held on the motion on August 6, and Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss on August 9.

Plaintiff has filed suit under 42 U.S.C. § 1983 (1988) seeking injunctive relief against the enforcement of a civil contempt order secured by the State of Florida in a state court, and seeking, as well, financial compensation. Specifically, Plaintiff prays that

> (a) a temporary restraining order and a permanent injunction issue [from this Court] enjoining Defendant Rundle from further pursuing her petition for rule to show cause and Plaintiff's incarceration deriving therefrom;
> (b) this Court vacate the Order of

> Contempt issued [by the state court] on March 18, 1993 detaining Plaintiff indefinitely ... [;]
> (c) Defendant be permanently enjoined from seeking any further rules to show cause in the collateral proceeding being conducted by Mr. Band on behalf of the State Attorney's Office;
> (d) Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances, including but not limited to his costs and attorney's fees in this matter.

Pl.'s Compl., pp. 9-10.

Plaintiff bases his suit on actions allegedly taken by Defendant in bad faith, resulting in the denial of his constitutional rights. He asserts that the following constitutional rights were violated: (1) his Fourteenth Amendment due process right to be free from bad-faith prosecutions; (2) his Fourteenth Amendment equal protection right to be free from selective prosecution; and (3) his First Amendment free speech right to seek and hold public office.

I. Factual Background

The following facts are taken from Plaintiff's Complaint for Injunctive Relief and are accepted as true for the purpose of ruling on Defendant's Motion to Dismiss. They are not findings of fact in an official sense; the motion before the Court is one to dismiss, not one for summary judgment, and Defendant has not filed an Answer to Plaintiff's Complaint. These facts are set forth to provide the proper context of this Court's holdings.

Plaintiff was a Dade County Commissioner until his electoral defeat in March 1993. On

April 29, 1992, Plaintiff reported to the police that his automobile had been stolen from his home in Coral Gables, Florida.

The automobile in question was recovered by the police within several days and returned to Plaintiff. Two individuals, named Claudia Lira and Kenneth Elswick, were found in possession of the automobile at the time it was recovered. Both are convicted felons and Lira has additionally been convicted of prostitution. After their arrest for the theft of Plaintiff's automobile, they alleged to police that Plaintiff had solicited Lira for prostitution, had engaged in sexual acts with her, had used cocaine at a crack house, and had purchased cocaine from an individual while at the crack house.

The State Attorney commenced an investigation of the allegations made against Plaintiff by Lira and Elswick. Assistant State Attorney Richard Gregorie was placed in charged of this investigation of Plaintiff. Plaintiff was ordered to submit to an FBI test of his hairs for residue of illegal drugs. The results of these tests were negative.

The State then commenced an investigation of Lira and Elswick for the theft of Plaintiff's automobile. This investigation was headed by Assistant State Attorney Michael Band. At that time, both Lira and Elswick were incarcerated on an unrelated warrant. The investigation proceeded despite the fact that both had confessed to the theft of the automobile and were immunized.

The State Attorney maintains that the investigations by Gregorie and Band are independent and segregated, that a "Chinese

wall" has been erected between the two investigators. Plaintiff contends that that wall has been breached by the sharing of information between personnel working on opposite investigations and that such breach was in aid of Gregorie's investigation of Plaintiff, not Band's investigation of Lira and Elswick.

The State then subpoenaed Plaintiff to appear on the day of the primary election in order to give testimony in the Band investigation of Lira and Elswick. Plaintiff was to be called as a victim and witness to the event, and as such, he was granted use immunity. At the hearing, Plaintiff refused to respond to most of the questions submitted by the investigating attorney, on the grounds that they were irrelevant to an investigation of Lira and Elswick. He contends that he is the true target of Band's investigation and that the State was attempting to set a perjury trap for him.

The state court, at the request of the State Attorney, then held a hearing as to why Plaintiff should not be held in contempt. At that hearing, Plaintiff contended, inter alia, that the State was selectively using its subpoena power in a discriminatory and unconstitutional manner. As grounds for this assertion, Plaintiff alleged (and alleges in this Court) primarily four facts. First, no individual situated similarly to Plaintiff has ever been held in contempt for failing to testify in a grand jury investigation of the crime to which he was a witness or of which he was a victim. Michael Strozer, Deputy Chief of the Felony Screening Unit for the State Attorney's Office, testified in state court that no other victim/witness of a crime in Dade County had ever been the subject of a rule to show cause in an auto theft case or even in cases involving more serious crimes.

Second, the investigating attorney asked Plaintiff questions Plaintiff considered irrelevant to an investigation of Lira and Elswick, including what Plaintiff ate for breakfast on the day of the theft. Third, the State Attorney evidenced its bad faith by calling Plaintiff to testify on the day of the primary election in which he was a candidate. And fourth, the State Attorney had publicly supported Plaintiff's main opponent in the election.

At the state court hearing, the trial judge denied Plaintiff's motions to quash the subpoena, and, on March 18, 1993, she found Plaintiff in contempt of court. Plaintiff was incarcerated until he agreed to testify in accordance with the trial court's order. Plaintiff was released several weeks later for health reasons, pending an appeal of the trial court's order. That order finding Plaintiff in contempt was affirmed by the Florida Third District Court of Appeal on June 2, 1993. Plaintiff now faces incarceration until he purges himself by testifying in accordance with the trial court's order of March 18.

II. Legal Standard

(a) Motion to Dismiss

This Court is generally reluctant to grant motions made under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss a complaint for failure to state a claim upon which relief can be granted. The liberal pleading rules embraced by Rule 8 of the Federal Rules require only that a complaint set forth a generalized statement of facts from which a defendant will be able to frame a responsive pleading. Fed. R. Civ. P. 8; Conley v. Gibson, 335 U.S. 41 (1957). However, when there exists an insuperable bar

to relief, the normal factors counseling a court to deny a motion to dismiss are not present. United States v. Uvalde Consol. Indep. School Dist., 625 F.2d 547, 549 n.1 (5th Cir. 1980), cert. denied, 451 U.S. 1002 (1981)[2]; 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1357 (1990) ("Wright & Miller").

For the purpose of a motion to dismiss, the complaint is construed in the light most favorable to the plaintff, and all facts alleged by the plaintiff are accepted as true. Wright & Miller at § 1357. There are a few exceptions to this rule, such as when the facts alleged are internally inconsistent or when they run counter to facts of which the Court can take judicial notice. Id. Conclusory allegations and unwarranted deductions of fact also are not accepted as true. Asscc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).

In the context of a claim under 42 U.S.C. § 1983, a defendant''s motion to dismiss will normally be granted only if the facts alleged by plaintiff, taken as true, do not show that the defendant deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States, and that the defendant acted under color of state law. Whitehorn v. Harrelson, 758 F.2d 1416, 1419 (11th Cir. 1985).

In ruling on the instant motion, there

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[2]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedents all decisions of the former Fifth Circuit issued before October 1, 1981.

exist the additional issues associated with the fact that the injunctive relief sought by Plaintiff in his complaint would enjoin a state, as distinguished from an entity of the federal government.

(b) Injuctive Relief

Under the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Supreme Court has held that suits brought under § 1983 qualify as an expressly authorized exception. Mitchum v. Foster, 407 U.S. 225 (1972).

In the seminal case of Younger v. Harris, 401 U.S. 37 (1971), the Supreme Court held that a federal court could enjoin a state criminal proceeding only where a defendant could show "bad faith, harassment, or [some] other unusual circumstance that would call for equitable relief ...." Id. at 54. The reasons for the restriction are that the federal intervention in on-going state criminal proceedings might result in duplicative legal proceedings, could disrupt the state criminal justice system, or could reflect negatively upon the state court's ability to enforce constitutional principles. Steffel v. Thompson, 415 U.S. 452, 462 (1974); see also Wooley v. Maynard, 430 U.S. 705, 709-10 (1977). These same rationales have been extended to limit federal intervention in some state court proceedings that are not criminal in nature, including contempt proceedings. See Juidice v. Vail, infra Part III(b), 430 U.S. 327 (1977).

Thus, if this Court finds that there exists a pending state court proceeding,

Plaintiff would have to meet the requirements of Younger and show "bad-faith enforcement or other special circumstances." Steffel, 415 U.S. at 454. Outside the Younger context, as explained infra, a plaintiff seeking injunctive relief must show, inter alia, that he will suffer irreparable harm unless the injunction is granted. In the Eleventh Circuit, "[a] showing of bad faith or harassment is equivalent to a showing of irreparable injury under Younger, and irreparable injury independent of the bad faith prosecution need not be established." Fitzgerald v. Peek, 636 F.2d 943, 944 (5th Cir. 1981); accord Wilson v. Thompson, 593 F.2d 1375, 1381 (5th Cir. 1979). Further, the threat of multiple or repeated prosecutions need not be shown in order to establish bad faith prosecution, nor must the plaintiff prove that the prosecution could not possibly result in a valid conviction. Fitzgerald, 636 F.2d at 944-45; Wilson, 593 F.2d at 1381.

Alternatively, if this Court does not consider there to exist an on-going state court proceeding, then Plaintiff would only have to meet the normal equitable requirements for an injunction. Westin v. McDaniel, 760 F. Supp. 1563, 1568-69 (M.D. Ga.), aff'd, 949 F.2d 1163 (11th Cir. 1991). To satisfy the normal equitable requirements, a party seeking injunctive relief in federal court must show: (1) a substantial likelihood that he will prevail on the merits; (2) that he will suffer irreparable harm unless the injunction is granted; (3) that the threatened injury to him outweighs the damage to the opposing party; and (4) that the injunction, if issued, will not be adverse to the public interest. Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1354-55 (11th Cir. 1983). Defendant, in her Motion to Dismiss, challenges Plaintiff only

on the second of these four requirements: that Plaintiff will suffer irreparable harm unless the injunction is granted.

This Court will examine both tests together, for Plaintiff has failed to satisfy either requirement: that he show a bad-faith prosecution under Younger, or that he show irreparable injury under the non-Younger scenario. The reason for Plaintiff's failure to satisfy either requirement is the same: even if the actions of the state have been taken in bad faith, they have not risen to the level of an imminent prosecution, and they have, as yet, not infringed on any of Plaintiff's constitutional rights.

III. Whether Plaintiff's Constitutional Rights Were Violated by a Bad-Faith Prosecution

Plaintiff alleges that he is being prosecuted in bad faith or is threatened with such a prosecution. This argument rests upon one of two related grounds: (a) that the state has set a perjury trap for Plaintiff, or (b) that the State's continued attempt to have Plaintiff held in contempt constitutes a bad-faith prosecution since it seeks to incarcerate Plaintiff in the same way as would a criminal prosecution.

(a) The Perjury Trap

The argument that the State has set a perjury trap that would entitle Plaintiff to injunctive relief is flawed. A perjury trap "is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury." United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991) (citation omitted). For a perjury trap to exist, the government must be using

its subpoena power to secure the perjury indictment "on matters which are neither material nor germane to a legitimate ongoing investigation of the grand jury." Id. (citation omitted); see also Brown v. United States, 245 F.2d 549, 555 (8th Cir. 1957) (holding that a perjury trap existed where the purpose of the prosecutor was solely to elicit perjured testimony on matters that had "no tendency to support any possible action of the grand jury within its competency"). Thus, when the State is "'attempting to obtain useful information in furtherance of its investigation', or 'conducting a legitimate investigation into crimes which ha[ve] in fact taken place within its jurisdiction', the perjury trap doctrine is, by definition, inapplicable." Chen, 933 F.2d at 797 (citations omitted).

In the instant case, then, there are two critical issues: Are the questions being asked by the State designed to elicit useful information in furtherance of a legitimate investigation into local crimes? and Can Plaintiff rely upon this argument at this juncture? Plaintiff may be able to make a prima facie showing that the questions submitted by the State are not, in reality, intended to further the legitimate investigation to which the State claims they are directed -- namely, the criminal case against the two individuals accused of stealing Plaintiff's automobile. Nonetheless, Plaintiff is unable to petition for injunctive relief at this time. For this Court to grant injunctive relief under normal equitable standards, the threat of injury must be actual and imminent, not remote and speculative. Here, the injury must be that of prosecution for perjury, and that can only be actual and imminent after Plaintiff has testified. Under the Younger standards, Plaintiff must similarly show a bad-faith

prosecution, or at least the threat of one, by the State. Again, none can be shown, or indeed is even possible, until after Plaintiff has testified. Bad faith by the State in the investigatory process can only be challenged in federal court when that bad faith manifests itself in an imminent prosecution.

Plaintiff contends that the threat of prosecution for perjury is actual and imminent because the State has started it will institute such a prosecution if, when Plaintiff testifies, his version of events related to the theft of his automobile differs from the State believes to be true. Still, this Court cannot know with certainty to what Plaintiff will testify when he is questioned under oath; presumably, he will tell the truth and could prevail on the merits in any subsequent perjury trial. At such a trial, he could also assert a perjury-trap defense. The Ninth Circuit was faced with this same issue (after the witness had already testified) and held that the government's anticipation that a witness would commit perjury was insufficient to satisfy the requirements of the perjury trap-doctrine. In Chen, the witness argued that the government had anticipated he would commit perjury because he had lied to the government in informal interviews prior to his grand jury testimony. 933 F.2d at 798. The court held that although the government might have anticipated the witness would lie, the government surely also recognized that the witness might testify truthfully. Quoting the Supreme Court, the Eleventh Circuit stated that when a witness "ha[s] been placed under a solemn oath to tell the truth, many witnesses feel obliged to do just that." Id. (quoting United States v. Washington, 431 U.S. 181, 188 (1977)).

Thus, it is clear that if the questions submitted by the State are intended to further a legitimate investigation, then the fact that the State believes the witness has lied in previous statements and may well do so under oath is insufficient to establish the existence of a perjury trap. Of course, this begs the question whether the questions submitted by the State in this case are material and germane to a legitimate on-going investigation, but this is an argument Plaintiff was free to advance in the state court contempt hearing and will be free to advance again if he faces an imminent threat of prosecution after he has testified.

(b) The Order of Contempt

Plaintiff also contends that his incarceration for contempt constitutes a bad-faith prosecution by the State. He seeks to prevent the irreparable injury which he says will ensue from the State's continued pursuit of its petition for rule to show cause, including damage to his health as a result of re-incarceration on the order of contempt.

The Supreme Court, however, has cautioned federal courts against interfering in state court contempt proceedings. In Juidice v. Vail, 430 U.S. 327 (1977), the Supreme Court held that the Younger principles applied to a case in which the state's contempt process was at issue. In such a situation, the Court said, "federal-court interference with the State's contempt process is 'an offense to the state's interest ... likely to be every bit as great as it would be were [it] a criminal proceeding.'" Id. at 336, (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)). The Court emphasized that judicial orders must be followed by individuals "however improvidently [those orders were] made, even

if it may seem certain that the court acted in granting them under misapprehension or mistake." Id. at 336, n. 12 (quoting Ketchum v. Edwards, 47 N.E. 918, 920 (1897)). The Court further pointed out that interference with the contempt process would also violate the other interests Younger sought to protect: it would "'unduly interfere [] with the legitimate activities of the State[e],'" (Id. at 336 (quoting Younger, 401 U.S. at 44)) and could "readily be interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles.'" (Id. (quoting Huffman, 420 U.S. at 604)). The Court in Juidice made clear that all that is necessary for federal abstention to be required is that the individual be accorded an opportunity to fairly pursue his federal claims in the state proceedings. Id. at 337 (citing Gibson v. Berryhill, 411 U.S. 564 (1973)).

In the instant case, Plaintiff has indeed had an opportunity to fairly pursue his federal claims in the state contempt proceeding. He can appeal the disposition of those issues through the state court system and can even file a petition for certiorari with the United States Supreme Court. The Supreme Court has made clear that in situations such as this, United States District Courts are not to intervene by granting injunctive relief, at least not absent a showing of bad faith on the part of the state courts; that is, for a United States court to intervene, a plaintiff must show that the opportunity to pursue his federal claims in the state court system was not fair. No such showing has been made by Plaintiff, and this Court consequently is not free to intervene in the state's contempt process.

IV. Selective Enforcement

Plaintiff contends that his constitutional rights have been violated by the State's institution of a selective enforcement proceeding against him. Defendant in her Motion to Dismiss has characterized the State's actions against Plaintiff as an investigation, and Defendant argues that a prosecution, not an investigation, must exist in order for the doctrine of selective enforcement to apply and for Plaintiff's constitutional rights to be implicated.

Plaintiff has responded that the instant case is tantamount to a criminal proceeding, just as if the state had filed an information against Plaintiff. This assertion is incorrect, for the case at hand involves civil contempt, rather than criminal contempt. Although both civil and criminal contempt proceedings may result in the incarceration of the individual charged, the criminal contempt charges are for conduct already taken by the individual, and in that context the individual has no power to purge his contempt prior to the expiration of the jail sentence imposed by the court. In the State of Florida, a criminal contempt proceeding is treated just as a criminal prosecution, with the individual entitled to a full panoply of constitutional rights associated with a criminal prosecution. In the context of civil contempt, by contrast, the proceeding is not treated as a criminal prosecution because the contemnor "carries the key to his cell in his own pocket." Pugliese v. Pugliese, 347 So.2d 422, 424 (Fla. 1977); see Andrews v. Walton, 428 So.2d 663, 665--66 (Fla. 1983) (contrasting civil and criminal contempt proceedings under Florida law). Thus, the instant case of contempt cannot be deemed tantamount to a criminal proceeding, as Plaintiff contends.

Defendant, however, is mistaken in the first instance in asserting that a criminal proceeding is necessary in order to find impermissible selective enforcement. The two cases cited by Defendant indeed involve allegations of selective enforcement in the context of a prosecution; however, neither of those cases indicates that a prosecution is a necessary element for the doctrine of selective enforcement to apply. There exist cases where a claim of selective enforcement has been sustained in the absence of a prosecution. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding a city board's denial of a retail license to a Chinese immigrant to be invalid on the grounds of selective enforcement); Sea-Gate, Inc. v. United States, 41 Cl. Ct. 25 (1983) (considering on the merits a claim of selective enforcement where the government sought to enforce easement rights against the plaintiffs). Selective enforcement claims may be sustained in a variety of contexts, including administrative, civil, and criminal proceedings.

Nevertheless, as one court has recognized, "[e]qual protection challenges to prosecutorial [or enforcement] decisions made by the government face an uphill struggle." Pakis v. City of Chicago, 1992 U.S. Dist. LEXIS 9567 at *17 (N.D. Ill. June 30, 1992) (brackets added). It is the exceptional case where a plaintiff is able to convince a federal district court to issue injunctive relief to prevent what he alleges to be selective enforcement by a state. The Supreme Court has cautioned federal courts to generally refrain from interfering in prosecutorial or enforcement decisions because the judiciary is ill-suited to examine the various factors that are relevant to such determinations. Wayte v. United States, 470 U.S. 598 (1985), cited in Pakis,

1992 U.S. Dist. LEXIS 9567 at *18.

In University Club v. City of New York, 655 F. Supp. 1323 (S.D.N.Y. 1987), the district court dismissed the plaintiff's allegations of selective enforcement. The court quoted the Second Circuit in formulating the test as follows: To make out a prima facie case of selective enforcement, a plaintiff must show "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution [or enforcement], and (2) that the government's prosecution [or enforcement] has been invidious or in bad faith, i.e., based upon impermissible considerations ...." Id. at 1328 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)) (brackets added). The court in University Club held that the plaintiffs' complaints did not adequately satisfy these two prongs, so the issue never made it to trial.

In Pakis v. City of Chicago, 1992 U.S. Dist. LEXIS 9567 (N.D. Ill. June 30, 1992), the plaintiffs alleged that the city of Chicago had unlawfully engaged in the selective enforcement of its parking ordinances. To avoid encroaching upon the state in an area traditionally reserved to state and local authorities, and to avoid deciding constitutional issues unnecessarily, the court dismissed the case, directing the plaintiffs to seek a state remedy first. As for the allegation of selective enforcement, the court dismissed that count with prejudice, finding the plaintiffs had failed to allege specific facts indicating that the situations where the government had chosen not to enforce the regulations were truly similar.

In Sea-Gate, Inc. v. United States, 4 Cl. Ct. 25 (1983), the federal Claims Court reached the merits of a selective enforcement claim. The plaintiffs in that case had sought to develop property adjacent to the Atlantic Inland Waterway, a government-owned and -maintained navigable waterway extending from Massachusetts to Florida; and they contended the United States had selectively enforced its easement rights on that property by denying them certain permits and by litigating the issue in court. As support for their selective enforcement argument, the plaintiffs pointed to numerous situations in Florida, South Carolina, and North Carolina where the government had permitted massive incursions on its easement rights and had not enforced its rights as it had against the plaintiffs. The court in Sea-Gate paraphrased the test enunciated in University Club and held the plaintiffs to a high standard of specificity. To meet the first prong of the test, the court required the plaintiffs to "establish the magnitude of the violations alleged and show that they [were] of the same or similar characteristics as the one established against them." Id. at *31.

The court further explained, "To determine whether other persons not sued are similarly situated to plaintiffs, the court must determine if there are factors permitting some rational basis for distinguishing among them." Id. (citing McGinnis v. Royster, 410 U.S. 263, 270 (1973)). The Sea-Gate court carefully examined each of the situations to which the plaintiff had pointed, and concluded that "when the type of easement, the availability and responsibility of local sponsors, and the nature, extent and location of construction are considered, [this development] stands out as unique." Id.

In the context of a motion to dismiss, then, the inquiry into whether the first prong of the test has been satisfied involves assessing whether a plaintiff has alleged that the individuals referred to in the complaint are indeed similarly situated.

In the instant case, Plaintiff has failed to allege facts that would support a claim of selective enforcement. Although Plaintiff has pointed to the testimony of Michael Strozer, Deputy Chief of the Felong Screening Unit for the State Attorney's Office, that no other victim of, or witness to, an auto theft in Dade County, has been subject of a rule to show cause, Plaintiff has not alleged that the situations and individuals in those other auto theft cases were truly similar to the one in which he was involved. He has not alleged, for example, that the other cases involved discrepancies about the location from which the auto had been stolen or that the State Attorney in the other cases had an equal amount of evidence to pursue. The mere fact (if accepted as true) that no other victim or witness of an auto theft has been subject of a rule to show cause is not sufficient to support a claim of selective enforcement where Plaintiff has not adequately alleged that the other auto theft cases presented substantively similar situations.

V. Plaintiff's Constitutional Right to Seek and Hold Public Office

In his Complaint, Plaintiff alleges that Defendant sought to hinder the free exercise of his First Amendment rights. Plaintiff states that Defendant in bad faith used her political power to thwart him in his election campaign. Defendant counters that damage to one's reputation is not actionable under § 1983 and that there is no federally protected

right to win an election to public office -- only to run in such an election.

The Eighth Circuit in Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981), involved issues and facts similar to those in the case at hand. There, the plaintiffs were former elected officials who had brought suit against a state attorney after losing their bids for re-election. One of the plaintiffs' claims was that the state attorney had made "continual, baseless accusations of criminal activity without filing any charges and [had] made derogatory statements to the news media." Id. at 1181. Citing Paul v. Davis, 424 U.S. 693 (1975), the Circuit Court upheld the dismissal of this claim on the grounds that damage to one's reputation, without some resultant denial of a constitutional right, is not actionable under § 1983. Another of the plaintiffs' claims in that case was that the state attorney "threatened to prosecute them in an attempt to punish them for their political beliefs and for exercising their right to free speech." Id. at 1182. The Eleventh Circuit held that this second claim did not require abstention under the Younger doctrine and, if properly pleaded, would state a cause of action. However, due to the absence of a single specific factual allegation to buttress the legal claim, the court affirmed the district court's order of dismissal, specifically permitting the re-filing of a complaint that alleged facts with reasonable specificity to support the claim.

In the instant case, as has been pointed out above in Part III(b), there existed at the time of the election, and there continues to exist, no threat of prosecution that can be seen as hindering Plaintiff in the exercise of his First Amendment rights. The Kaylor court did not address whether the first of the allegations in that case -- that

of "continual, baseless accusations of criminal activity without filing any charges and [of making] derogatory statements to the news media" -- could, if pleaded with the requisite specificity, constitute a cause of action in light of a consequent electoral loss. The court recognized, as did the Supreme Court in Paul, that such a charge, coupled with a resultant denial of a constitutional right, would indeed be actionable under § 1983. The question in the instant case, then, becomes whether Plaintiff's electoral loss (allegedly the result of the statements and actions of Defendant state attorney), represents the denial of a constitutional right.

The Eleventh Circuit addressed this question in Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985), cert. denied, 476 U.S. 1116 (1986). In Flinn, a former state representative brought suit against several individuals for actions connected with charges of sexual harassment which allegedly led to his electoral defeat upon re-election. The party moving to dismiss the charges against her in that case was a state representative who had sat as the chairperson of the house committee which had investigated the harassment charges against the plaintiff. The case dealt most directly with whether the qualified immunity afforded this defendant in her capacity as a public official exempted her from defending the suit. However, one aspect of the case addressed whether the plaintiff has a constitutional right to continued employment as a state legislator. Noting that the plaintiff had not been removed from office during the term to which he had been elected, the court stated, "Although he certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election." Id. at 1554.

Consequently, regardless of the issue of qualified immunity, the court stated, the plaintiff had "failed to allege any act for which he would be entitled to relief under § 1983." Id.

Thus, the Eleventh Circuit has resolved that the loss of an election cannot constitute the deprivation of a constitutional right. Such a loss, then, is insufficient to satisfy the Paul requirement that there be a denial of a constitutional right as a result of the bad-faith damage to an individual's reputation by a public official. Plaintiff, therefore, does not have a cause of action under § 1983 for actions related to his electoral loss.

VI. Conclusion

The situations in which a federal court can issue injunctive relief against state action are limited when there is an on-going state proceeding, as there appears to be in this case with the state contempt proceeding. Even if there is not an on-going proceeding at the state level, Plaintiff's claims still fail to meet the requirements necessary for this Court to issue the injunctive relief sought.

Plaintiff alleges that Defendant (1) has initiated a bad-faith prosecution of Plaintiff either by establishing a perjury trap or by seeking his incarceration for refusing to testify in an official investigation; (2) has selectively enforced a rule against Plaintiff by seeking to have him held in contempt for refusing to testify in the investigation of the theft of his automobile; and (3) has interfered with Plaintiff's rights to seek and hold public office by manipulating the timing of the auto-theft investigation and making public

statements in the media -- all in violation of Plaintiff's constitutional rights.

The charge of a bad-faith prosecution fails because a perjury-trap defense cannot be asserted until after the individual has testified and because federal courts are constrained in when they can issue injunctive relief from an order of contempt issued by a state court, at least when the plaintiff has had an opportunity to raise his constitutional claims in state court. The selective enforcement claim fails because Plaintiff has not adequately alleged that other individuals against whom the state did not proceed were truly similarly situated. And the final claim fails because even if the actions alleged by Plaintiff actually caused Defendant to lose the primary election, this would not give rise to a federal constitutional cause of action; one has a right to run for public office but not to win, and it has not been alleged that Defendant interfered with Plaintiff's attempt to run. Section 1983 does not convert into a federal cause of action every claim alleging wrongdoing by a state official. Baker v. McCollan, 443 U.S. 137 (1979); Shillingford v. Holmes, 634 F.2d 263 (5th Cir. Unit A Jan. 1981). In the instant situation, Plaintiff's proper proper recourse is to the state courts.

Accordingly, after a careful review of the record, and the Court being otherwise fully informed in the premises, it is

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Dismiss be, and the same is hereby, GRANTED. This Complaint is dismissed with prejudice.

DONE and ORDERED in Chambers at the United States District Courthouse, Federal

Courthouse Square, Miami, Florida, this 14th day of September 1993.

s/ JAMES LAWRENCE KING
James Lawrence King
United States District Court
Southern District of Florida

cc: Joseph R. Gomez, Esq.
Michael J. Neimand, Esq.
Michael R. Band, Esq.

[**APPENDIX "B"**]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5032

JOSEPH M. GERSTEN,

Plaintiff-Appellant,

versus

KATHERINE FERNANDEZ RUNDLE,
State Attorney for the Eleventh
Judicial Circuit in and for
Dade County, Florida,

Defendant-Appellee.

On Appeal from the United States District
Court for the Southern
District of Florida

ON PETITION(S) FOR
REHEARING
AND SUGGESTION(S)
OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

(check mark) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, a majority for the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s_____
United States Circuit Judge

[**APPENDIX "C"**]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: 92-25309 (08)

STATE OF FLORIDA,

Plaintiff,

vs. ORDER OF CONTEMPT

JOSEPH M. GERSTEN.

_____/

THIS CAUSE came on to be heard on a request from the Dade County State Attorney's Office to hold Mr. Joseph M. Gersten in contempt of Court and the Court having heard argument, taken testimony, and being otherwise fully advised in the premises makes the following findings:

1. In or about August of 1992, a subpoena was issued and served on Joseph M. Gersten in order to secure his presence for a pre-filing statement to assist the Office of the State Attorney in its investigation of an alleged grand theft of his Mercedes Benz.

2. In or about August of 1992, Mr. Gersten requested that this subpoena be quashed before Judge Phillip Knight and again before Judge Alan Schwartz, both of whom denied this relief. A similar motion was filed before this court in August of 1992 and Mr. Gersten was ordered to appear and answer the questions of the Assistant State Attorney, Mr. Michael Band. This court agreed to review all questions posed for relevancy, materiality, and whether they

would lead to further discoverable evidence. While this relief was unprecedented for the taking of a pre-filing statement by the State, there has been no higher court ruling overturning this decision and it presently stands as law of the case. Normally, the how, when, why and who of prosecution are always within the decision making power of the State Attorney's Office and are so in this instance as well.

3. Just before Mr. Gersten was to appear in the Office of the State Attorney to meet with Mr. Band, another Motion to Quash was filed with this court and a full hearing was had wherein the court denied the relief sought by Mr. Gersten. A Petition for Certiorari was filed and denied in December of 1992.

4. Thereafter, Mr. Gersten was once again ordered to appear to give his statement to the Office of the State Attorney. Again, just prior to his required appearance, Mr. Gersten filed a Motion to Disqualify the Office of the State Attorney with this court. After a full evidentiary hearing, the relief sought by Mr. Gersten was denied. A Petition for Certiorari was filed and denied on March 16, 1993.

5. Thereafter, Mr. Gersten was once again ordered to appear to give his statement in the Office of the State Attorney and again just prior to his appearance on that date another Motion to Quash the Subpoena and a second Motion to Disqualify the Office of the State Attorney was filed. The Motion to Quash the Subpoena was denied not only because it raised matters that could have been raised in August of 1992 and January of 1993, but additionally this court found that the assertions contained in that motion lacked merit and failed to even allege the

threshold factual basis for such relief. Further, the second Motion to Disqualify the Office of the State Attorney was denied as failing to allege the necessary facts to show that such relief was warranted. Mr. Gersten was thereafter order to appear and give his statement.

6. In the afternoon of March 17, 1993, Mr. Gersten appeared in the office of the Assistant State Attorney, Michael Band and answered certain questions and refused to answer others. Mr. Gersten and his attorney, and the Assistant State Attorneys appeared in this court and sought direction as to which questions needed to be answered by Mr. Gersten. After hearing the entire proceeding, the court ordered Mr. Gersten to answer certain questions as posed by Mr. Band.

7. It is important to note that at a pre-filing conference, which is what is sought in this case from Mr. Gersten, it is usual for the Assistant State Attorney not only to seek facts which will assist them in the prosecution of their cases, but additionally which will aid them in determining what kind of witness the victim will be during trial and whether they will fare well under the difficult experience of cross-examination. This is particularly true in third degree felony matters where the mass of cases in that category that are field require that this type of evaluation be done early on in a case to as to make efficient use of manpower.

8. Mr. Gersten has refused to comply with this Court's order to answer Mr. Band's questions. It is certainly within his power to comply with the orders entered. It is to be noted that Mr. Gersten sought relief in this court and sought the rulings of this

court but has steadfastly refused to comply.

9. The issue herein is whether an individual who is the subject of a lawful and properly served subpoena who seeks protection from that subpoena and where such protection is denied and is ordered to answer questions is in contempt of the court when he refuses to answer. This question must be answered in the affirmative. Therefore, on the evidence presented it is adjudged that Joseph M. Gersten is in contempt of this court for failure to answer the questions posed by the Office of the State Attorney and ordered to be answered by this court. Parenthetically, there is the issue regarding a victim's right to dictate how the investigation of a crime is to be conducted. No victim can do this, but at this juncture is it an issue secondary to Mr. Gersten's refusal to comply with lawful court orders.

10. Obviously the next issue for this court is the type of action appropriate to obtain compliance by Mr. Gersten.

11. It is not the place of a judge to determine whether the Office of the State Attorney should prosecute a case in this jurisdiction. This is solely within the provide of the OFFICE of the State Attorney. It is only the judge's job to determine whether the laws have been violated and if so, what an appropriate sanction should be. This order does not address the propriety of any action except of Mr. Joseph M. Gersten who, like any citizen, came into this court for relief, sought ordered which were entered and has now plainly refused to obey. No one of us can ignore our laws which we have all agreed to live by as a nation for more than 200 years.

12. It is therefore the decision of

this court that Mr. Gersten shall be confirmed to the Dade County Jail beginning this date unless he purges himself in the manner specified herein.

13. Mr. Gersten may purge himself of his contempt by the following:

a. Answering all questions previously ordered by this court to be answered in the office of Mr. Michael Band.

b. By continuing his pre-filing statement in the Office of the State Attorney under the terms and conditions previously ordered in August of 1992.

14. The Court find Mr. Joseph M. Gersten had the action and present ability to comply with the purge provisions of this order. The keys to Mr. Gersten's release from confinement are in his own keeping.

15. This order will be reviewed in thirty days to determine if there is a reasonable likelihood that Mr. Gersten will comply if he has not done so within that time.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 18th day of March 1993.

_____

AMY N. DEAN, Circuit Judge

[**APPENDIX "D"**]

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF FLORIDA

==========

CASE NO. 93-1229

MAGISTRATE JUDGE BANDSTRA

==========

[STAMP AND SEAL] [CIV-KING]
[FILED BY D.C.]
[1993 JUN 25 PM 12:48
T.G. CHELIOTIS]
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S.D. OF FLA.- MIAMI

JOSEPH M. GERSTEN, :

Plaintiff, :

vs. :

KATHERINE FERNANDEZ RUNDLE, State Attorney for the Eleventh Judicial Circuit in and for Dade County Florida, :

Defendant. :

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, JOSEPH M. GERSTEN (hereinafter sometimes referred to as "Gersten"), for his complaint against Defendant alleges as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a resident of Dade County, Florida who was formerly a member of the Dade County Board of County Commissioners. Prior thereto, Plaintiff served four terms in the Florida House of

Representatives and two terms in the Florida Senate. Plaintiff has been a member of the Florida Bar since 1975.

2. Defendant Katherine Fernandez Rundle is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida.

3. This is an action for injunctive relief which meets all requirements of law. Plaintiff seeks this Court's mandate preventing his forced re-incarceration pending final determination of the merits of this cause

4. The jurisdiction of this Court is based upon 42 USC S.1983, 28 USC S.1343 and 28 USC S.1331.

5. Venue is proper under 28 USC S.1391(e) and (1) a substantial part of the events giving rise to this claim occurred in this district; and (2) the plaintiff resides in this district.

II. FACTUAL BACKGROUND

6. The complaint arises out of an incident which occurred on April 29, 1992. Specifically on said date, Plaintiff reported the theft of his automobile from his Coral Gables home. Based upon Plaintiff's statement to the police, a report was filed and several suspects were apprehended, including convicted felon and prostitute by the name of Claudia Lira ("Lira") and a convicted felon by the name of Kenneth Elswick ("Elswick"). Following their arrest, Lira and Elswick made allegations that Plaintiff solicited Lira for prostitution, engaged in sexual acts with her, used cocaine at a crack house, and purchased cocaine from a third individual while at the crack house.

7. Following the theft, Plaintiff's car was found and returned to him several days later by the police. No questions were asked by either police or prosecutors at that time. Thereafter, Plaintiff and his fiancee departed on a previously planned vacation to France.

8. Several days after his arrival in France, Plaintiff learned of media reports echoing the accusations of Lira and Elswick to the effect that Plaintiff was involved in drug use and prostitution with them when his car was stolen. A media frenzy ensued, unabated to this day.

9. Plaintiff then consulted with his attorney, William Richey, who advised him that the State was conducting a serious investigation into the matter.

10. Plaintiff thereupon returned from France to a media assault of theatrical proportions. Since that time period, Plaintiff has been the target of an investigation by the State Attorney's office relating to the aforementioned alleged drug use, alleged prostitution, and alleged filing of a false police report.

11. The assistant state attorney in charge of this investigation is Richard Gregorie. As part o this investigation, Mr. Gregorie sought an unprecedented pre-charge search warrant for Plaintiff's hair. The warrant stated in essence that if the allegations by the persons caught in possession of Plaintiff's car were true, Plaintiff's hair would contain the res.

12. As a result, Plaintiff was taken to the Dade County Medical Examiner's Office where he had pubic, underarm and head hairs cut at the root and sent immediately to

Washington, D.C. to be examined and tested for drugs by the Federal Bureau of Investigations's Laboratory.

13. To the apparent surprise of the State, the FBI hair test came back negative. Thus, there was no probable cause to file an information based on any of the drug related charges alleged by the car thieves to have been committed by the Plaintiff. After Plaintiff passed this FBI hair test, and after one of the car thieves was tape recorded by State Attorney investigators offering to sell his testimony to Plaintiff's attorney, the State Attorney's Office constructed a so-called "Chinese Wall" wherein it purported to have opened a second , presumably independent, investigation of the car thieves for the purpose of prosecuting them for the theft of Plaintiff's car. The State had immunized Gersten's accusers. Further, Lira and Elswick confessed to the theft of Gersten's car. Nevertheless, Assistant State Attorney Michael Band thereafter subpoenaed Plaintiff and granted him use immunity for his testimony regarding the theft of his car.

14. However, Plaintiff declined to respond to certain of the State Attorney's questions because of substantial evidence that the State was clearly acting in bad faith in issuing the subpoena. Several series of events in the State proceedings made it patently obvious that the Plaintiff (and not Lira and Elswick) was the real target of the State. For example, testimony developed at several hearings before Dade Circuit Judge Dean revealed that the State purposefully attempted to set up a "perjury trap" for Plaintiff since it had insufficient evidence to issue and information against him for any of the alleged crimes. Further evidence revealed

that the "Chinese Wall" set up by the State had been breached by the sharing of information between various State Attorney personnel on different sides of the wall. This sharing of information was intended to further the investigation of Plaintiff, and not the investigation of the real criminals, Lira and Elswick.

15. In addition, that the State was seeking a rule to show cause against the victim/witness of a crime raised numerous questions about whether the State was using its subpoena power in a discriminatory and unconstitutional manner.

16. The selective use of its subpoena power was, in fact, confirmed when Michael Strozer, Deputy Chief of the Felony Screening Unit for the State Attorney's Office, testified that no victim/witness of a crime in Dade County had ever been the subject of a rule to show cause in an auto theft case or even more serious crimes other than Plaintiff.

17. Further evidence of the State's bad faith and illicit motives became apparent when the State called Plaintiff to testify on election day, the day Plaintiff was running for re-election to retain his seat on the Metro-Dade Commission.

18. The State's unscrupulous and improper actions became even more insidious when Plaintiff learned that the State Attorney herself had publicly supported Gersten's main opponent, Conchy Bretos, in the election. Thus, while the State Attorney herself was publicly supporting a candidate for office, her assistant state attorneys were using the State's prosecutorial powers to attempt to incarcerate Ms. Bretos' opponent (Gersten) on election day.

19. Plaintiff submits that the State knew full well what the result would be of calling in Plaintiff on election day. This case, as the State knows has, at every turn, received widespread media attention. The day of the election was no different. That Plaintiff Gersten was called in for a sworn statement and was facing jail time was fully reported in the print media on the day of election. Further, the entire proceeding before Judge Dean was reported the night before the election and throughout election day on local television.

20. Consequently, the State (as well as Ms. Rundle) must be charged with knowing that it was creating a scenario where it would necessarily affect plaintiff negatively in the election. At the same time, the State and Ms. Rundle must be charged with knowing that such an action would most certainly benefit Ms. Rundle's political ally, Conchy Bretos, in the election.

21. Further, Mr. Band revealed at the taking of the sworn statement on election day that he had approximately "one and one-half of legal pads-full of questions" to ask Plaintiff relating to the theft of his car. Such questions included what Plaintiff ate for breakfast on the morning of the day of the theft. All of these types of questions were under the guise that Mr. Band needed such information in order to prosecute Lira and Elswick.

22. All of the foregoing acts of bad faith, as well as other acts which will be more fully developed at the preliminary injunction hearing, were the subject of numerous motions to quash the subpoena before State trial court Judge Amy Dean. However, she denied all such motions.

23. Thereafter, Judge Dean proceeded to find Plaintiff in civil contempt of court on Thursday, March 18, 1993, and ordered that Plaintiff be incarcerated indefinitely, unless and until he purges himself in the manner specified in the trial court's order.

24. After approximately three weeks in jail during which Plaintiff's physical health seriously deteriorated and his life was placed in danger, Plaintiff was able to obtain release from custody pending appellate review of Judge Dean's order of contempt.

25. However, on June 2, 1995, the Florida Third District Court of Appeal affirmed per curiam the trial court's order of contempt. This appellate order is expected to become final in the next few days following the likely denial of Plaintiff's motion for rehearing. Thereafter, the State will seek to have Plaintiff re-incarcerated and placed into the custody of the Dade County Correctional Department.

IV. STATEMENT OF CLAIM AND PRAYER FOR RELIEF

26. Plaintiff repeats and realleges paragraphs 1 - 25 of this Complaint.

27. Plaintiff repeats and realleges the allegations of all previous motions and pleadings filed in furtherance of his claims in the state trial and appellate courts.

28. The State Attorney, by supporting Plaintiff's opponent, Conchy Bretos, and choosing election day for calling Plaintiff in for questioning unlawfully

sought to hinder Plaintiffs exercise of his First Amendment right to seek and hold office -- an abuse of the office of State Attorney for what are blatantly political moves.

29. The State, by moving for an order of contempt and by engaging int eh numerous acts of bad faith as briefly set forth hereinabove, has sought to destroy Plaintiff's political and professional career as well as ruin his personal life and reputation.

30. The state trial court, by acceding to the State's petition, had condoned the State's blatant bad faith acts and unlawful objections.

31. A temporary restraining order and a permanent injunction enjoining the State from continuing to demand Plaintiff's incarceration together with an appropriate order that Plaintiff not be detained by judicial fiat are essential to prevent immediate and irreparable injury to Plaintiff, both as to his First Amendment right to seek and hold office as well as further damaging his political, personal and professional reputations.

32. Plaintiff has no other adequate remedy at law.

33. Unless the State proceeding is enjoined by this Court, Plaintiff may be incarcerated indefinitely.

34. Unless the State proceeding is enjoined by this Court, Plaintiff will suffer immediate and permanent adverse effect to his health due to the episodal dangerously high blood pressure he suffered for the first time in his life as a result of his incarceration.

35. Plaintiff through his previous pleadings, filed simultaneously herewith and made part hereof, has shown his likelihood of prevailing on the merits in this Complaint for Injunctive Relief.

WHEREFORE, Plaintiff, Joseph M. Gersten, prays that:

(a) a temporary restraining order and a permanent injunction issue, enjoining Defendant Rundle from further pursuing her petition for rule to show cause and Plaintiff's incarceration deriving therefrom;

(b) this Court vacate the Order of Contempt issued on March 18, 1993 detaining Plaintiff indefinitely based on the State's bad faith, unethical conduct, conflicts of interest, as well as the State's selective, vindictive, and demagogic prosecution of Plaintiff as argued before this Court and in part previously before the Florida state circuit and appellate courts;

(c) Defendant be permanently enjoined from seeking any further rules to show cause in the collateral proceeding being conducted by Mr. Band on behalf of the State Attorney's Office;

(d) Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances, including but not limited to his costs and attorney's fees in this matter.

Respectfully submitted,

JOSEPH R. GOMEZ, ESQUIRE
Attorney for Joseph M. Gersten
1378 Coral Way - Fourth Floor
Miami, Florida 33145
Telephone: (305) 854-7001

Facsimile: (305) 856-4342

By s/_____
Joseph R. Gomez
Florida Bar No. 724319

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon: MICHAEL BAND, ASSISTANT STATE ATTORNEY, Office of the State Attorney, 1351 N.W. 12th Street, Miami, FL 33125, this 25 day of June, 1993.

JOSEPH R. GOMEZ, ESQUIRE
Attorney for Joseph M. Gersten
1378 Coral Way - Fourth Floor
Miami, FL 33145
Telephone:(305) 854-7001
Facsimile:(305) 856-4342

By s/_____
Joseph R. Gomez, Esquire
Florida Bar No. 724319

[**EXHIBIT "E"**]

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
THIRD DISTRICT JANUARY TERM 1993

JOSEPH GERSTEN,

Appellant, CASE NO. 93-0547

L.T. CASE NO.
9225309 (08)

v.

STATE OF FLORIDA,

Appellee.

Decision filed June 2, 1993
NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF

Appeal of a non-final order
from the Circuit Court for
Dade County; Amy N. Dean, Judge

Joseph R. Gomez, Miami, for
appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and
Katherine Fernandez Rundle,
State Attorney, and Richard
L. Schriffin and Joel D.
Rosenblatt, Assistant State
Attorneys, Miami, for
appellee.

PER CURIAM.

AFFIRMED.

GLICKSTEIN, HUGH S., ANSTEAD, HARRY L., and
KLEIN, LARRY A., Associate Judges, concur.
[**APPENDIX "F"**]